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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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I

The opinion below is in square conflict with *Aetna Insurance Co.* v. *Licking Valley*, 19 F. 2d 177 (6th Cir.). In the *Aetna* case the court held admissible extrajudicial statements (a) made in the course of a business transaction, (b) material on the assumption that the statements made were true and (c) offered in favor of the declarant's principal or colleague.

The Government's brief virtually concedes the conflict of circuits. The Government seeks to distinguish the *Aetna Insurance* case on the facts. But in *Aetna* the court specifically refused to limit the res gestae doctrine to any narrow definition of spontaneous exlamations. The court followed the doctrine laid down in Wharton on Evidence and in *St. Clair* v. *United States*, 154 U.S. 134, 149, that the res gestae include statements "in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself."

In both the *Aetna* case and the present case the statements were made in the course of pertinent business transactions—there, solicitation and agreement for an insurance policy; here solicitation and agreement for black market whiskey purchases. It is immaterial that in the *Aetna* case the business transactions were lawful and, in the present case, unlawful.

Gersh's statements are no less closely related to the business transactions in issue, no less unpremeditated, and no less spontaneous, than Bennett's statements in the *Aetna* case. They were both in immediate causal relation to the business transactions, a relation not broken by an individual wariness seeking to manufacture evidence.

Gersh's statements can not in any way be challenged as self-seeking when made, or as involving a deliberate manufacture of evidence. If anything these statements when made had the effect of implicating rather than exculpating Gersh. His statements of the past are certainly more reliable than his present testimony denying black market involvement.

The court below took direct issue with the principle followed in the *Aetna* case by saying that such statements could not be received in favor of a principal or coconspirator of the declarant. There is a patent conflict which should be resolved by this Court.

—II—

If anything this case is clearer for admissibility than *Aetna*. The mere fact that Gersh made the statements attributed to him established the fact, denied by Gersh at the first trial and denied by the prosecutor at the second trial, that Gersh was engaged in whiskey black market activities. This was vitally material to petitioner's defense. That was wholly overlooked or ignored by the court of appeals below.

The Government claims (Brief 10) that even assuming petitioner paid some black market whiskey bonuses to Gersh, there was "overwhelming" evidence that he attempted to evade some income taxes.

On the contrary. "If [Corriston's] evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case." (Mr. Justice Douglas' opinion on bail, Pet. Appx. p. 10a.)

The bare sentence in the Government's brief is made without any analysis or any refutation of petitioner's analysis of the evidence.

1. How was the conviction obtained from the jury? On the basis that there was nothing whatever to connect Gersh with whiskey transactions (R. 14919, p. 8), and that it would be fantastic to credit petitioner's account of sending large sums of cash to Gersh for black market whiskey bonuses. That is how the prose-

cution's case was summarized in the charge of the trial judge (R. 14109, p. 483):

> "The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts of cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."

The second jury responded with a conviction. It recommended leniency. This recommendation is the more striking since the jury was unaware that at the first trial Gersh had admitted handling $85,000 from petitioner,—including $38,300 in cash in three shipments, two by mail and one by express. (Pet. p. 11.) Gersh was compelled to admit these receipts because they were established by his bank records. But Gersh denied any involvement in whiskey black market purchases. He testified he obtained this money from petitioner to buy coin machines. The trial judge excluded petitioner's evidence to impeach Gersh's coin machine explanation. The court of appeals reversed this exclusion: the evidence was material to determine whether petitioner or Gersh was telling the truth as to why the money was paid to Gersh.

At the second trial, instead of broadening inquiry into the facts the Government released Gersh from subpena. As soon as petitioner learned that Gersh was nevertheless in San Francisco, after the case was closed but before argument to the jury, defense counsel sought leave to call Gersh to identify the bank records. The Government objected and defense application was denied.

It is not the interest of justice, but the scoreboard of convictions, that accounts for the Government's blocking the fullest inquiry into the facts.

The Government's conviction was obtained by deriding petitioner's testimony of his cash shipments of black market whiskey overages to Gersh as a cock and bull story invented for purposes of trial.

Unsupported, petitioner's account may not have been persuasive. But a very different complexion would be put on the case at a new trial. Petitioner's account would be corroborated not only by Gersh's own admission of substantial cash receipts and substantiating bank records, as at the first trial, but Corriston's testimony would supply the vital missing link by corroborating petitioner's testimony as to Gersh's whiskey black market activities.

2. As to the amounts paid by petitioner to Gersh, the critical difference between the testimony of petitioner and Gersh concerned the transaction in November, 1943. Petitioner testified that at that time he personally delivered $60,000 to Gersh—$30,000 by draft, and $30,000 in cash. Gersh claimed that he handled the $30,000 bank draft only to cash same for petitioner, and denied receipt of the other $30,000 cash. (Pet. p. 11.)

Petitioner's testimony as to this November payment, together with the amounts admittedly received by Gersh, establish payments to Gersh of 95 percent of the amount of black market receipts to be accounted for by petitioner.

Corriston's newly discovered evidence corroborates petitioner's version of the November payment to

Gersh. It establishes not only the $10,000 cash which Gersh paid to Taylor at the luncheon meeting, held later in November or December, but is circumstantial evidence as to the balance of approximately $50,000 arranged by Gersh and Taylor at that meeting. As a result of that luncheon meeting 2,138 cases of Old Boston Rocking Chair whiskey was shipped to petitioner. Petitioner testified he paid Gersh $25 a case (or $53,450 for this shipment). The Government brief blandly overlooks the fact that at the luncheon meeting there was not only a $10,000 cash deposit but an agreement that the balance of the $50,000 bonus would be paid upon shipment. But this evidence is admissible and material and cannot be shut out of consideration. Corriston corroborates petitioner's testimony that he delivered $60,000 to Gersh in November 1943.

3. The Government refers to the fact that the motion for new trial was denied by the district judge who presided over the trial. But the district judge made no finding or analysis as to the facts. His ruling was that there was no "legal basis" for granting the new trial. The district judge accepted the Government's argument that Corriston's testimony was legally inadmissible.

As to the closing passage of the opinion of the court of appeals, the Government's brief tacitly admits—because it can not fairly deny—the point made in the petition that the court incorrectly recalled the facts of the case and failed to take into account the effect of the total evidence which would for the first time be available to corroborate petitioner's testimony at the new trial. The court's opinion was not based on fact

findings or analysis by the district judge, but consisted of erroneous speculations as to possible facts which if they existed would have supported the order. The court departed from its proper appellate province and from the course of justice to petitioner.

a. Basically the court of appeals rested its conclusions as to the facts on a scornful rejection of petitioner's supposed defense that he made no profits whatever as a result of the black market activities. But that was not petitioner's testimony. His point was and is that he made substantial profits but they were realized at the retail (tavern) level. At the wholesale level petitioner's black market profits were absorbed by what would otherwise have been losses on his resales at ceiling to the Wolcher taverns. The profits of the Wolcher taverns were substantially increased thereby, at the retail level. But the income tax returns for the Wolcher taverns were all true and correct. Petitioner violated the OPA but not the income tax laws.

b. The factual misapprehension of the court of appeals is shown by its statement that petitioner would be corroborated "as to the disposition of but a portion of the black market money admittedly received, leaving a large amount unaccounted for except by appellant's testimony."

(1) Petitioner's black market receipts were not $200,000 as stated by the court of appeals. The amount established was $88,853.71 on the Eastern whiskey, and $95,000 in all—and even that rested primarily on petitioner's admissions. (Pet. p. 5.)

(2) Corriston's newly discovered testimony is evidence of the entire $50,000 payment agreed to for the

last whiskey shipment, not merely the $10,000 cash deposit paid. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892). This evidence corroborates petitioner's testimony that he personally delivered $30,000 in cash to Gersh in November 1943, in addition to a $30,000 bank draft, as contrasted with Gersh's version that he never received such cash. This is in addition to the $85,000 admittedly handled by Gersh according to Gersh's testimony and the bank records. There is corroboration not as to a mere "portion" but rather as to 95 percent of petitioner's black market receipts to be accounted for.

CONCLUSION

Petitioner paid taxes on $66,950 income. He admits substantial profits from his black market activities but points out that these were at the retail (tavern) level—not the wholesale level. There is no claim of tax understatement by the Wolcher taverns.

At a new trial petitioner's testimony would be corroborated as to all but minor aspects.

If the newly discovered evidence is admissible, it is substantial in the perspective of the case and warrants a new trial.

The ruling that the newly discovered evidence is inadmissible warrants review by this Court.

Respectfully submitted,

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August 24, 1956